

Commission's Rules has not been amended.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

[FR Doc. E7-18500 Filed 9-19-07; 8:45 am]

**BILLING CODE 6712-01-P**

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

[DA 07-3478; MB Docket No. 05-245; RM-111264, RM-11357]

#### Radio Broadcasting Services; Animas, NM; Corona de Tucson, AZ; Lordsburg, NM; Sierra Vista, Tanque Verde and Vail, AZ; and Virden, NM

**AGENCY:** Federal Communications Commission

**ACTION:** Final rule.

**SUMMARY:** In response to the Counterproposal filed by Cochise Broadcasting, LLC and Desert West Air Ranchers Corporation, this document reallocates Channel 267C3 from Corona de Tucson to Tanque Verde, Arizona, and modifies the license of Station KKYZ to specify Tanque Verde as the community of license. To continue local service at Corona de Tucson, it reallocates Channel 253A from Vail, Arizona, to Corona de Tucson, and modifies the Station KRDX license to specify Corona de Tucson as the community of license. To replace local service at Vail, it substitutes Channel 279A for Channel 279C1 at Lordsburg, New Mexico, reallocates Channel 279A to Vail, and modifies the outstanding construction permit (File No. BNPH-20050609ABD) to specify operation on Channel 279A at Vail. Finally, it allots Channel 279C1 to Animas, New Mexico, and Channel 228C1 to Virden, New Mexico, as first local services. The reference coordinates for the Channel 267C3 allotment at Tanque Verde, Arizona, are 32-19-59 and 110-45-19. The reference coordinates for the Channel 253A allotment at Corona de Tucson, Arizona, are 32-55-39 and 110-37-57. The reference coordinates for the Channel 279A allotment at Vail, Arizona, are 31-58-16 and 110-35-59. The reference coordinates for the Channel 279C1 allotment at Animas, New Mexico, are 31-56-50 and 108-28-45. The reference coordinates for the Channel 228C1 allotment at Virden, New Mexico, are 32-24-12 and 108-53-59. With this action, this proceeding is terminated.  
**DATES:** Effective September 20, 2007.

**FOR FURTHER INFORMATION CONTACT:** Robert Hayne, Media Bureau (202) 418-2177.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the *Report and Order* in MB Docket No. 05-245, adopted July 30, 2007, and released July 31, 2007. The full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Information Center at Portals II, CY-A257, 445 12th Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's copy contractor, Best Copying and Printing, Inc. 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone 1-800-378-3160 or <http://www.BCPIWEB.com>. The Commission will send a copy of this *Report and Order* in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

#### List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ As stated in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

#### PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334, 336.

##### § 73.202(b) [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under New Mexico, is amended by adding Animas, Channel 279C1 and by adding Virden, Channel 228C1.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

[DA 07-2196; MB Docket No. 05-263; RM-11269]

#### Radio Broadcasting Services; Church Rock and Grants, NM

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; dismissal.

**SUMMARY:** This Report and Order dismisses two Counterproposals as

unacceptable for consideration. In addition, this *Report and Order* reallocates Channel 279C0, Station KYVA-FM, from Grants, New Mexico, to Church Rock, New Mexico, and modifies the license of Station KYVA-FM accordingly. The foregoing change of community provides the first local aural transmission service to Church Rock. The Media Bureau's Consolidated Database System (CDBS) reflects these changes.

**ADDRESSES:** Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** R. Barthen Gorman, Media Bureau, (202) 418-2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's *Report and Order* in MB Docket No. 05-263, adopted May 23, 2007, and released May 25, 2007. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. The document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone 1-800-378-3160 or <http://www.BCPIWEB.com>. The Commission will not send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A), because Section 73.202(b) of the Commission's Rules has not been amended.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

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**BILLING CODE 6712-01-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

#### 49 CFR Part 661

[Docket No. FTA-2005-23082]

RIN 2132-AA90

#### Buy America Requirements; End Product Analysis and Waiver Procedures

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Final rule.

**SUMMARY:** The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) requires the Federal Transit Administration (FTA or the Agency) to make certain changes to the Buy America requirements. This Final Rule creates a new publication process for public interest waivers to provide an opportunity for public comment; clarifies Buy America requirements with respect to microprocessor waivers; issues new provisions to permit post-award waivers; clarifies the definition of "end products" with regards to components, subcomponents, and major systems, and provides a representative list of end products; clarifies the requirements for final assembly of rolling stock and provides representative examples of rolling stock components; expands FTA's list of communications, train control, and traction power equipment; and updates debarment and suspension provisions to bring them into conformity with statutory amendments made by SAFETEA-LU.

**EFFECTIVE DATE:** The effective date of this publication is October 22, 2007.

**FOR FURTHER INFORMATION CONTACT:** Richard Wong, Office of the Chief Counsel, Federal Transit Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 366-4011 or [Richard.Wong@dot.gov](mailto:Richard.Wong@dot.gov).

**SUPPLEMENTARY INFORMATION:****I. Background**

On November 28, 2005, the Federal Transit Administration (FTA) published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** (70 FR 71246) that discussed several proposals mandated by SAFETEA-LU (Pub L. 109-59, August 10, 2005), and proposed to provide further clarification of existing FTA decisions on Buy America. Due to the complexity of many Buy America issues addressed in the NPRM and the divergence of opinion in important areas, FTA issued a final rule that addressed fewer subjects than addressed in the NPRM. (71 FR 14112, Mar. 21, 2006.) These more routine topics covered in the final rule included: (1) Administrative review; (2) the definition of "negotiated procurement;" (3) the definition of "contractor;" (4) repeal of the general waiver for Chrysler vans; (5) certification under negotiated procurements; (6) pre-award and post-award review of rolling stock purchases; and (7) miscellaneous corrections and

clarifications to the Buy America regulations.

The Second Notice of Proposed Rulemaking (SNPRM) (71 FR 69412, Nov. 30, 2006) addressed six issues identified in the original NPRM but not covered in the initial final rule: (1) A publication process for public interest waivers to provide an opportunity for public comment; (2) a clarification of Buy America requirements with respect to microprocessor waivers; (3) new provisions to permit post-award waivers; (4) clarifications in the definition of "end products" with regards to (a) components and subcomponents, (b) major systems, and (c) a representative list of end products; (5) a clarification of the requirements for final assembly of rolling stock and a list of representative examples of rolling stock items; (6) expanding FTA's list of eligible communications, train control, and traction power equipment; and added a technical correction; and, an update of the debarment and suspension provisions to bring them into conformity with statutory amendments made by SAFETEA-LU.

**1. Published Justification for Public Interest Waivers**

In the first NPRM, FTA proposed amending 49 CFR 661.7(b) to implement the SAFETEA-LU requirement that FTA publish justifications for public interest waivers in the **Federal Register** and provide for notice and comment. The NPRM proposed to continue the current practice of posting all public interest waiver requests on FTA's Buy America Web site for public review and comment, with the additional step of publishing FTA's proposed approvals in the **Federal Register** for additional comment.

After a thorough review of the comments received in response to the NPRM, which were discussed at length in the SNPRM, FTA believed that SAFETEA-LU intended a four-step process: (1) Publish the incoming public interest waiver request on FTA's Web site for public review and comment; (2) publish FTA's proposed approvals and FTA's justification in the **Federal Register** for formal notice and comment; (3) issue a formal written decision to the applicant; and (4) post copies of the formal decision on FTA's Web site.

**A. Comments Received**

FTA received six comments in response to the SNPRM. All supported an expedited approach. Most supported the 30-day timeframe proposed in the SNPRM, although one commented that providing fair public notice was more essential than a rapid turnaround.

Two commenters urged FTA to publish both the incoming request and the proposed determination in the **Federal Register**. Several commenters complained that monitoring both FTA's Web site and the Federal Register Web site on a daily basis for potential waiver petitions was unduly burdensome.

One commenter to both the NPRM and SNPRM suggested that FTA not limit publication of decisions to approvals of waiver petitions. The commenter noted that lessons learned from disapprovals lead to a better understanding and application of the Buy America requirements.

**B. FTA Response**

FTA believes that a dual **Federal Register** publication process for both incoming requests and proposed determinations would be slow and cumbersome, jeopardizing FTA's ability to maintain a 30-day processing time. FTA believes that publication of incoming requests on FTA's Buy America Web site with simultaneous notice to trade associations such as the American Public Transportation Association (APTA) and the Community Transportation Association of America (CTAA) provides interested parties with adequate notice and opportunity to comment, and that formal publication of FTA's proposed determination and justification in the **Federal Register** meets SAFETEA-LU's notice and comment requirements. As explained in the NPRM and SNPRM, FTA believes the plain language of SAFETEA-LU and its legislative history expressly requires FTA to issue a written justification and to publish it in the **Federal Register**, and only in instances where the justification supports a waiver request. *See* 49 U.S.C. 5323(j)(3); *see also* H.R. Conf. Rep. No. 109-203, at 952 (2005). However, FTA agrees with the commenter who asked FTA to also publish denial letters, and FTA will publish both approval and denial letters on its Web site, as FTA believes that researchers and potential applicants will find both documents useful.

With regards to the concern that monitoring both FTA's Web site and the **Federal Register** for public interest waivers will be unduly burdensome, FTA has made improvements to its Web site whereby interested parties can subscribe to be notified whenever a new item is published on a specific FTA webpage, including FTA's table of its **Federal Register** publications. FTA believes that this proactive notification system will reduce, if not eliminate, the need to constantly monitor both FTA's Web site and the **Federal Register** for

waiver petitions and determination letters.

Accordingly, FTA believes the following process meets the requirements specified in SAFETEA-LU: (1) Post notification of the public interest waiver request on FTA's Web site and solicit comments on the request; (2) based on the comments received, prepare a justification that explains the rationale for approving or denying a waiver request; (3) publish the justification in the **Federal Register** for notice and comment within a reasonable time; and (4) publish the final decision on FTA's Web site regarding the waiver request, based on comments received in response to the published justification.

It should be noted that upon review of the formal comments received in response to the publication of the proposed determination and justification in the **Federal Register**, FTA may ultimately determine that a waiver is *not* in the public interest, and deny the request, despite FTA's initial determination. FTA believes that this methodology would create a total processing time of about 30 calendar days.

## 2. Microcomputer/Microprocessor Waivers

In the SNPRM, FTA requested comment on its proposal to implement the SAFETEA-LU requirement to "clarify" that any waiver of the Buy America requirements for a microprocessor, computer, or microcomputer, applies "only to a device used solely for the purpose of processing or storing data" and does not extend to the product or device containing a microprocessor, computer, or microcomputer.

### A. Comments Received

FTA received nine comments on this issue, many of which echoed identical comments submitted in response to the initial NPRM, proposing the exclusion of input/output devices and software. Other commenters voiced objections to the current methodology of considering the cost of the microcomputer/microprocessor as domestic content for purposes of meeting the 60% domestic content requirement, suggesting that the cost of the exempted item should be excluded from the sum of the end product's domestic and non-domestic content. On the other hand, several commenters stressed that existing regulatory practices must be continued to avoid significant disruption in the industry, emphasizing that FTA was directed to "clarify" its existing Buy America interpretations with regard to

microcomputers and microprocessors, without changing the current regulatory regime.

### B. FTA Response

In FTA's attempt to clarify that the waiver applied to devices "used solely for the purpose of processing or storing data," commenters misinterpreted this effort to mean that "input/output" facilities and software should now be excluded from the waiver's coverage. Such is not the case. Although the current version of the general waiver at 49 CFR 661.7, Appendix A, does not include the term "input/output" facility, FTA has interpreted the waiver to include software ("microcomputer equipment, *including software*, of foreign origin can be procured by grantees.") (Emphasis added.) In addition, the inclusion of input/output devices under the waiver provision was used in a previous definition of a microcomputer. See 50 FR 18760, May 2, 1985 ("A basic microcomputer includes a microprocessor, storage, and *input/output facility*, which may or may not be on one chip.") (Emphasis added.)

FTA agrees with commenters that Congress did not intend for FTA to change its current regulatory treatment of microcomputer equipment. See H.R. Conf. Rep. No. 109-203, at 952 (2005) ("In directing the Secretary to issue new regulations regarding microprocessors, computers, or microcomputers, there is no intent to change the existing regulatory treatment of software or of microcomputer equipment.") Because SAFETEA-LU directed FTA to "clarify," not alter current regulatory policy, FTA will continue to allow both software and input/output devices to be covered under the microcomputer/microprocessor waiver, provided that the waiver is limited to the device used solely for the processing or storing data. Consistent with prior FTA rulemakings and letters of determination, the waiver does not extend to an entire product or device merely because it contains a microprocessor or microcomputer, such as a laptop computer, video display monitor, farecard reader, or similar piece of hardware or equipment.

### 3. Post-Award Waivers

FTA sought comment in the first NPRM on its proposal to create a post-award non-availability waiver. Under FTA's current regulation, a bidder or offeror that certifies compliance with Buy America is "bound by its original certification" and "is not eligible for a waiver of those requirements." 49 CFR 661.13(c). The NPRM's proposed language would allow grantees to request a non-availability waiver after

contract award where a bidder or offeror had originally certified compliance with the Buy America requirements, but can no longer comply with its certification and contractual obligations due to commercial impossibility or impracticability.

In the SNPRM, FTA revised the provisions in the first NPRM based on responses from commenters who recommended that in the interest of consistency, FTA use the existing process for non-availability waivers set forth in 49 CFR 661.7(c). In addition, commenters suggested that FTA include a "good faith" element in its deliberations. FTA agreed and the SNPRM proposed that a grantee, when making a request for a post-award waiver, should provide specific evidence of a contractor's good faith when justifying the post-award waiver. This evidence would include information about the origin of the product or materials, invoices, or other relevant solicitation documents as requested and that the item to be procured cannot now be obtained domestically due to commercial impossibility or practicability. Additionally, when determining whether conditions exist to grant a post-award waiver, the SNPRM stated that FTA would consider all appropriate factors on a case-by-case basis.

### A. Comments Received

FTA received four comments on the revised language. Two commenters, one a large public transit agency and one a system manufacturer concurred with the SNPRM's revised approach. The third commenter, a large transit agency, expressed concerns about validating the credibility of its supplier or contractor and the sufficiency of the evidence that needed to be submitted to FTA as part of the waiver request. The transit agency was concerned that it could be placed in a conflict of interest position or subjected to litigation if had to advocate on behalf of a given vendor. The fourth commenter, a large trade association representing transit agencies and their vendors and suppliers, opined that the consideration of other bidders or offerors should have no consideration in FTA's evaluation of post-award non-availability requests, believing that a frustrated second-lowest bidder could hold a transit agency "economic hostage" to a frustrated competitor who had obtained limited remaining domestic supplies through exclusive distribution agreement or other arrangement. According to the trade association, the situation would result in significant cost increases as the transit agency would be forced to

terminate its contract with the initial contractor with no effective competition to ensure reasonable pricing.

#### B. FTA Response

FTA believes that the language set forth in the SNPRM forms a reasonable approach. With regard to proving supplier or contractor credibility, a transit agency may reasonably rely upon a contractor's representation, as making a knowingly false claim in a Federally-funded procurement could subject a perjurious contractor to Federal criminal statutes and possible debarment from future contracting opportunities. With regard to the sufficiency of the evidence, the SNPRM stated that FTA will consider all factors on a case-by-cases basis. If FTA believes that the document submitted by a grantee or its contractor is insufficient, inadequate, or suspect, FTA may request additional information to determine whether there is sufficient evidence to justify granting a waiver.

With regard to the concerns of the third commenter that submitting a waiver request would raise conflict-of-interest issues, FTA believes that submitting a post-award waiver request would not constitute advocacy on behalf of a given vendor, but rather, constitutes advocacy on behalf of the transit agency itself, which would be forced into reopening a bid or otherwise encounter performance delays without a post-award waiver.

FTA does not agree with the comments from the fourth commenter that the status of other bidders should be excluded from consideration. The Buy America status of other responsive bidders, including losing bidders, is materially relevant, particularly where the winning bidder is seeking to substitute non-domestic materials for domestic ones. The intent of Buy America is to safeguard American jobs by requiring that steel, iron, and manufactured goods used in an FTA-funded project are produced in the United States—not to protect a particular contractor or supplier against the vagaries of the marketplace. In deciding whether to grant a post-award waiver, therefore, FTA will consider the status of other bidders or offerors who are Buy America compliant and can furnish domestic material or products on an FTA-funded project. Concluding otherwise would violate the legislative intent of Buy America.

With regard to the commenter's concern that a losing bidder offering American-made products could hold the purchaser economic hostage and charge extortionary rates, FTA acknowledges that it has the authority to grant a cost-

differential waiver if the price of acquiring a domestic product would increase the cost of the overall contract to the transit agency by more than 25 percent. Because the SNPRM stated that FTA would consider "all appropriate factors on a case-by-case basis" in deciding whether to grant a post-award waiver, FTA believes it would be appropriate to take the reasonableness of any cost differential into account when deciding whether to grant a waiver request. Whether the 25 percent cost differential would apply to the cost of the non-available domestic product or to the cost of the overall contract is a factor FTA would consider on a case-by-case basis, depending upon the significance of the product to the overall contract.

#### 4. "End Products"

SAFETEA-LU directed FTA to define the term "end product," and in defining the term, FTA is to "address the procurement of systems under the definition to ensure that major system procurements are not used to circumvent the Buy America requirements." In addition, SAFETEA-LU directed FTA to develop a list of representative end products that are subject to Buy America requirements.

##### 4a. Defining "End Product" Under a Shift and Non-Shift Approach

FTA's initial NPRM sought comments on two alternative definitions of the term "end product." The first proposed definition came from FTA's current, long-standing practice whereby the end product is the deliverable item specified by the grantee in the third party contract. Under this "shifting" methodology, the same item could be an end-product, a component, or a subcomponent, depending upon the deliverable specified in the third party contract, with applicable Buy America requirements attaching based on an item's characterization. Applying this shifting approach, FTA's first proposed definition stated: "End product means any item subject to 49 U.S.C. 5323(j) that is to be acquired by a grantee, as specified in the overall project contract."

FTA's second proposal was to base the definition of "end product" on that found in the Federal Acquisition Regulation (FAR) at 48 CFR part 25 implementing the Buy American Act, 41 U.S.C. 10a-10d. Under this definition, end products do not shift and components and subcomponents retain their designation. FTA's second proposed definition for this "non-shift approach" stated: "End product means any article, material, supply, or system,

whether manufactured or unmanufactured, that is acquired for public use under a federally funded third party contract." To that point, FTA created a list of representative end products that was included in the SNPRM.

Based on its analysis and review of the comments received in response to the first NPRM, FTA concurred with the majority of commenters who recommended that FTA adopt the second "non-shift" proposal in the SNPRM, finding that such an approach would (1) foster reasonable predictability and stability in the transit business community, (2) enable offerors and bidders to price proposals more accurately, and (3) allow transit agencies to obtain better prices.

Several commenters opposed the NPRM's "non-shift" approach, stating that keeping track of aftermarket rolling stock parts would not only prove to be an impossible burden for grantees, it would also discourage parts suppliers from developing an aftermarket support structure within the United States, potentially increasing the lead time for the purchase of replacement parts. These concerns were based on the assumption that FTA would treat replacement parts under the rolling stock standard (*i.e.*, where sixty percent of the subcomponents of a component, by cost, must be domestic, but forty percent may be foreign-sourced). To address the concerns of these commenters, the SNPRM proposed to treat rolling stock replacement parts under the simpler "manufactured products" standard in 49 CFR 661.5, which requires that a component be manufactured domestically, without the need to document the origin of each of its subcomponents. As FTA's Buy America regulation currently states, a component of a manufactured product "is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents." 49 CFR 661.5(d)(2).

The SNPRM's proposal to apply the "manufactured product" standard to replacement parts is very different from the current regulation that applies the rolling stock standard to such parts. Under the current regulation, a component of rolling stock, in order to be Buy America-compliant, must consist of at least 60% domestic subcomponents. A rolling stock component, if purchased later as a replacement part, shifts upwards to become an "end product" and its subcomponents shift to become "components" and must consist of 100% domestic, even if the original subcomponent was part of the vehicle's

allowable 40% non-domestic content. The SNPRM proposed that replacement components would retain their characterization as “components” throughout the life of the vehicle and their replacements would not shift upwards to become “end products.” In addition, replacement components would be subject to the “manufactured products” standard with regard to the origin of its subcomponents.

By applying the “manufactured products” standard to replacement components, suppliers would still be required to manufacture replacement components in the United States, thereby preserving a domestic manufacturing base while at the same time recognizing the global marketplace with regard to the procurement of subcomponents. In addition, applying the “manufactured products” test to the acquisition of replacement components relieves manufacturers and buyers of the burden of documenting country-of-origin records for an endless number of possible subcomponents, so long as the component itself is manufactured in the United States. FTA believed the SNPRM’s approach provided limited relief from current practices and was not likely to disrupt the supply industry.

A more significant change in the SNPRM pertained to the replacement of subcomponents. Under the current regulation, if a purchaser replaces rolling stock subcomponents, those replacement parts also shift upwards to become “end products” (*i.e.*, the item must be American-made). The SNPRM proposed that replacement parts would be subject to the same Buy America requirements that applied to the original part—subcomponents would not shift upwards to become “end products” but would instead remain “subcomponents” throughout the life of the vehicle. Albeit such a rule might lead to an increase in the level of foreign-sourced replacement parts, FTA believed that the benefits of consistency, stability, and favorable price structures in the transit industry and would outweigh any disadvantages to domestic suppliers.

#### A. Comments Received

The four parties who submitted comments on this issue represented a broad cross-section of docket commenters—one of the nation’s largest public transit agencies, a manufacturer of an integrated fare collection system, a manufacturer of rolling stock, and a large industry trade association. All four endorsed FTA’s proposal.

The SNPRM, the trade association noted, “will provide the market predictability the transit industry needs to maintain stability and reasonable

pricing,” adding that permanently fixing the status of a part as components or sub-components for all future purposes would allow agencies to procure proven replacement parts without non-productive recordkeeping. The transit agency expressed similar concerns that maintaining records of rolling stock end products, components, and end products throughout the service life of the vehicle would have been an “unbearable burden.” The fare collection system manufacturer concurred without additional comment, while the rolling stock manufacturer stressed that components “should always be manufactured in the U.S. regardless of whether the component was purchased as part of an end product or separately as a service part for an end product.”

#### B. FTA Response

Based on the comments received, FTA is adopting the SNPRM’s non-shift approach. Under the current regulation, a procurement for a replacement part, whether the part was previously classified as a component or a sub-component, is treated as a procurement for an “end product.” Under the new approach, procurements for replacement parts, whether components or subcomponents of the original end product, would retain their characterization and the requirements applicable to manufactured products would apply. This new approach would apply consistently to the procurement of replacement parts for rolling stock as well as to manufactured products.

This approach to replacement parts is supported by the trade association’s comments that the SNPRM’s approach would “provide the market predictability the transit industry needs to maintain stability and reasonable pricing,” and that “fixing their status as components or sub-components for all future purposes will allow agencies to procure replacement parts without non-productive record keeping.” For rolling stock components, FTA recognizes that the illustrative list of “typical” rolling stock components in Appendices B and C to 49 CFR 661.11 will assist procurement officers in identifying components. For manufactured products, the contract or the bid proposal would govern the hierarchy of components and subcomponents.

In addition, the classification of “components” and “subcomponents” would not only apply to the procurement of items purchased as part of the vehicle’s original equipment, but would apply consistently to the same item if purchased as an aftermarket accessory. To illustrate, under the

present regulation, a bicycle rack is treated as a “component” if specified in a contract for the purchase of a new bus, but is treated as an “end product” if subsequently purchased as an aftermarket accessory or as part of a vehicle rehabilitation or retrofit. FTA believes that the same Buy America rules should apply regardless of when the bicycle rack is purchased, *i.e.*, a bicycle rack will be treated as a component and must comply with the manufactured products standard. This approach will lead to consistency in the manufacturing of components and will greatly simplify the procurement process for transit agencies and their suppliers.

In the NPRM, FTA considered an approach that would have permitted the replacement of non-domestic components and subcomponents with identical products of non-domestic manufacture. But due to comments from transit agencies that maintaining country-of-origins records for every component and subcomponent throughout a vehicle’s useful service life was too great of a recordkeeping burden, FTA is not adopting this approach.

FTA believes that the benefits of the non-shift approach to the procurement of replacement parts outweigh any potential impact on replacement parts manufacturers. FTA finds it noteworthy that despite publication of the SNPRM and a request for data in the February public meeting, FTA received no comments to the docket from domestic suppliers of replacement subcomponents that quantified any adverse economic effects, particularly since the SNPRM would have subjected them to potential foreign competition.

FTA believes that adopting the non-shift approach will benefit transit agencies in their direct procurement of replacement parts, and lead to additional cost-savings to transit agencies and component manufacturers in the procurement of subcomponents. The non-shift approach will also provide consistency and stability with regard to the identity of components and subcomponents, eliminating the distinctions between the procurement of rolling stock and manufactured product replacement parts, and different procurement standards for replacement parts and aftermarket products. Transit agencies will be able to procure replacement parts from the original part manufacturers, purchasing agents will find it easier to determine the applicable Buy America rules when attempting to procure replacement parts, and opening the market to foreign and domestic sources will guarantee favorable price

structures in the transit industry and cost savings to the American taxpayer.

#### 4b. "System" as an "End Product"

SAFETEA-LU requires that "the procurement of systems" be addressed "to ensure that major system procurements are not used to circumvent the Buy America requirements." The NPRM sought comment on whether FTA should continue its longstanding practice of including "systems" as definable end products. Furthermore, FTA sought comment on a proposed definition of "system" which was based on the "functional test" for interconnected systems from the Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. 1202, heading 8474, used in customs law. The NPRM proposed to define "system" as "a machine, product, or device, or a combination of such equipment, consisting of individual components, whether separate or interconnected by piping, transmission devices, electrical cables or circuitry, or by other devices, which are intended to contribute together to a clearly defined function."

Although many commenters expressed concerns that manufacturers could potentially abuse the definition of "system" to incorporate a large degree of non-domestic subcomponents into a single "end product" procurement, a majority of commenters encouraged FTA to continue its longstanding practice of including a "system" as a definable end product. Furthermore, FTA noted that SAFETEA-LU only required FTA to develop a rule to "ensure that major system procurements are not used to circumvent the Buy America requirements," and did not expressly seek to prohibit the designation of systems as end products. Rather, SAFETEA-LU instructed FTA to develop a rule that would cure potential abuses, without eliminating system procurements or drastically changing FTA's long-standing Buy America practices.

FTA received many comments offering alternatives to the NPRM's proposed definition of "system." Some commenters suggested FTA should consider whether performance warranties apply to an integrated system; whether products perform on an integrated basis with other products in a system, or are operated independently of associated products in the system; or whether transit agencies routinely procure a product separately (other than as replacement or spare parts). Based on these comments, FTA rewrote the SNPRM's definition of "system" to incorporate these criteria.

#### A. Comments Received

Five commenters responded to FTA's proposal. Four were generally appreciative of FTA's approach, while one, a transit vehicle manufacturer, found the concept "confusing and unnecessary," and urged a more concise definition and a full listing of end products. A large transit agency supported FTA's definition, proposing that FTA add a "minimum set of components and interconnections" factor to the criteria. A large industry trade association, while appreciative of FTA's efforts, commented that the SNPRM "fails to provide necessary guidance to the industry" and stated that the list of characteristics should be expanded, lest the absence of one characteristic be seen as determinative. The commenter added that the definition should address what types of systems would not be eligible for consideration as end products. A manufacturer of a fare collection system responded to the trade association's comments, stating that the trade association's members were unable to achieve consensus on this issue and that because the trade association was unable to propose clear product-specific categories as an alternative definition to FTA's approach, FTA should instead use principles in performing its analysis.

#### B. FTA Response

Based on the comments received and on SAFETEA-LU's statutory language and legislative history, FTA is retaining the SNPRM's definition of a "system" and will add the term "system" to the definition of "end product." FTA believes the definition proposed in the SNPRM and the new illustrative criteria will protect against the bundling of unrelated independent products into a "super system" that would undermine the principles of Buy America. Most importantly, as FTA explained in the SNPRM, FTA is willing to carefully review major system procurements to determine whether an integrated system actually exists, and, if so, which items constitute the system. This review process will further serve to avoid the circumvention of Buy America requirements.

FTA believes a fare collection system, in toto, meets the definition of an "end product." FTA reached this conclusion in a 1994 and 2002 decision involving the Massachusetts Bay Transportation Authority (MBTA), and a 1995 decision involving the Tri-County Metropolitan District of Oregon. In these three decisions FTA cited 49 CFR § 661.11(s) in defining "end product" as any item

procured by a grantee as specified in the overall project contract. Furthermore, FTA believes that the fare collection system at issue in its 2002 determination would have met the SNPRM's definition of "system:" the warranty clause referred to a single end product, *i.e.*, an automated fare collection system; the automated fare collection system was the subject of a single procurement whereby the manufactured "end product" was functionally different than that which would have resulted from a mere assembly of elements or materials; and most importantly, the individual parts performed on an integrated basis with other parts of the system.

Under FTA's Buy America current methodology, if a purported end product is too large, *i.e.*, composed of what FTA traditionally considers as separate "end products" such as structures, vehicles, fare collection equipment, etc., FTA will break it down into separate end products. FTA's willingness to do this in previous requests to evaluate the characterization of a turnkey rail project as a "system" should allay the fears of commenters that an end product system could be so large, and incorporate so many different levels of equipment such as stations, track, vehicles, fare collection equipment, etc., that Buy America requirements could be circumvented.

FTA remains aware that a single large-scale procurement could conceivably contain multiple end products, each of which must independently meet the requirements of Buy America. But at the same time FTA also recognizes that various elements may be integrated into a single system. FTA is aware of the developing trend towards systems procurements and the potential circumvention of Buy America requirements, and will therefore exercise heightened scrutiny in this area, using the new criteria. FTA notes, however, that the criteria are illustrative rather than determinative, and that lacking one of the criteria would not necessarily result in the automatic disqualification of a "system."

#### 4c. Representative List of End Products

SAFETEA-LU directed FTA to develop a "representative list" of end products. FTA sought comment on a proposed list of representative end products in the first NPRM, and as FTA explained then, the proposed list was not meant to be all-inclusive, instead describing general "representative" categories of end products consistent with the legislation.

#### A. Comments Received

FTA received five comments on this issue. Of these, two commenters concurred with FTA's approach. One commenter stated that FTA's proposed representative list was "too abbreviated and inconsistent," recommending that FTA issue a more extensive or comprehensive list and subjecting that list for public comment before publishing it as a Final Rule. Another commenter representing a coalition of manufacturers provided a list of end products that it believed should be added to the representative list, stating that products identified on the list should retain their status as end products, even if incorporated into a new system. One commenter, an elevator manufacturer, sought clarification that the adjective "mobile" in the representative list of manufactured products applied to lifts, hoists, and elevators that were movable and not part of a facility's permanent infrastructure.

#### B. FTA Response

FTA agrees with the commenters who recommended FTA implement a "representative" list of end products for two reasons: First, SAFETEA-LU directed the Secretary to "develop a list of *representative* items that are subject to the Buy America requirements" (emphasis added). By use of the term "representative" rather than "comprehensive," FTA believes that Congress did not intend that the list be exhaustive. Second, FTA agrees that it would be unrealistic and unnecessary to develop a comprehensive list and keep it constantly updated as some commenters suggested.

FTA believes it is impractical to attempt to produce an exhaustive comprehensive list of every conceivable end product, component, and subcomponent in the transit industry. The comprehensive lists offered by commenters to the NPRM and SNPRM, which were often very lengthy, highly detailed, and seldom uniform, illustrate the difficulty of creating such a list. One commenter stated that the suggested lists of end products were not based upon the development of reasonable governing principles, but rather, "by parochial interests that are focused literally on a product by product basis." That commenter recommended that FTA design its regulations around principles that can be fairly and impartially applied on a consistent basis in a technologically complex and constantly evolving environment.

FTA believes that a more practical approach is to issue a representative list

that is not meant to be all-inclusive and to rely upon basic governing principles to address future deliberations. An example of this practical approach are the representative lists of typical bus and rail car components found in Appendices B and C to 49 CFR 661.11. Manufactured products not enumerated on those component lists can be analyzed within the context of other items on those lists, using governing principles. FTA's representative list of "end products" is similarly reflective of the broad scope of transit procurements and new end products can be similarly assessed.

With regard to the applicability of the term "mobile," FTA intended for it to apply to all portable or moveable lifts, hoists, and elevators. FTA did not intend that permanently affixed lifts, hoists, and elevators would be considered as "end products." Rather, they will continue to be considered components of the larger facility, which itself could constitute the "end product."

#### 5. Definition of "Final Assembly"

In the first NPRM, FTA sought comment on its proposal to amend the definition of "final assembly" in 49 CFR part 661 for rolling stock procurements by incorporating the minimum requirements for final assembly as outlined in FTA's March 18, 1997, Dear Colleague letter, C-97-03, which Congress implemented through section 3035 of the Transportation Equity Act for the 21st Century (TEA-21) (Pub. L. 105-178).

Several commenters recommended several changes to the NPRM's proposed definition, suggesting that it be made consistent with the descriptions of incorporation and final assembly for rail cars and buses in 49 CFR 661.11(b) and (c). FTA concurred with these commenters, agreeing that the definition of final assembly should refer back to 49 CFR 661.11(b) and (c) for the bus and rail car components that must be incorporated into the end product at the final assembly location.

FTA also agreed with a commenter who recommended that language from the March 18, 1997, Dear Colleague letter regarding FTA determinations of compliance be added to the "final assembly" provisions.

#### A. Comments Received

Although two transit agencies concurred with FTA's approach without providing substantive comments, the proposal was opposed by five rolling stock manufacturers, a large industry trade association, a consortium of suppliers, and a consultant, all of whom

submitted lengthy comments to the SNPRM describing their opposition. These commenters pointed out that the Dear Colleague letter has been successfully implemented for the past ten years, and that any changes could create confusion for manufacturers and grantees. One commenter noted that the Dear Colleague letter reflected extensive input from industry participants. Vehicle manufacturers stated that they had made long-term operational and investment decisions based on existing law and guidance, and changing policy would be "extremely onerous and harmful to manufacturers that currently comply with existing laws." Another commenter warned that adoption of the SNPRM's language would have "unintended consequences" on an "already fragile bus industry."

Finally, commenters pointed out that the Dear Colleague letter's definition of "final assembly" had been acknowledged and memorialized by Congress in section 3035 of TEA-21, and Congress did not indicate any direction for FTA to alter the current definition of final assembly.

#### B. FTA Response

FTA finds the commenters persuasive. Not only does the Dear Colleague letter reflect widespread industry understanding of the final assembly process, it is a long-standing precedent that reflects industry input and consensus and has been recognized by Congress as an acceptable standard. Therefore, FTA is withdrawing the proposed language in the SNPRM and will instead continue to implement the terms of the March 18, 1997, Dear Colleague letter, with a few minor additions to reflect industry practices that have taken effect after the 1997 Dear Colleague letter was issued, such as the construction of bus shells and the installation of locomotive engines in passenger railcars.

#### 6. Communication, Train Control, and Traction Power Equipment

FTA sought comment on three substantive proposals to the Buy America requirements for rolling stock components in the NPRM. In the first of these proposals, FTA sought comment on whether it should continue to find that the items of communication equipment listed in 49 CFR 661.11 include wayside equipment, *i.e.*, communication equipment that is not in or on a vehicle, but on the adjacent tracks or right-of-way. FTA also sought comment on whether the items of train control, communication, and traction power equipment listed in 49 CFR 661.11(t), (u), and (v) should be deleted

and whether any new items should be added to these lists to reflect new technology. Finally, FTA sought comment on whether the term “communication equipment” should be limited to equipment whose primary function is communication “with or between people” or whether it should be expanded to include a “machine-to-machine” interface.

Based on comments received in response to the NPRM, FTA determined that the rolling stock requirements for communications equipment would continue to apply to wayside equipment. One commenter recommended deleting several items from the proposed lists of train control, communication, and traction power equipment, but several more commenters suggested the addition of items to the lists, which was reflected in the SNPRM. With regard to the expansion of the term “communication equipment” to include machine-to-machine interactions, FTA noted in the SNPRM that modern communication networks frequently support both capabilities (*i.e.*, human to human interaction and machine-to-machine interface) and it would be difficult in those situations to determine which components of the communication equipment was supporting one purpose or the other. Moreover, FTA’s review of prior Buy America decisions involving communication equipment supported these conclusions and FTA declined to make such a distinction in the SNPRM. However, the SNPRM stated that FTA will continue to carefully scrutinize, on a case-by-case basis, whether technology may properly be characterized as “communication equipment” within the meaning of the rolling stock provisions of 49 U.S.C. 5323(j) and 49 CFR 661.11.

#### A. Comments Received

Two of the three commenters to the SNPRM concurred with FTA’s approach. One commenter, a large transit agency, believed that further modification was necessary to reflect current technology and practices—namely, that propulsion systems and cab display should be added to the list of traction power equipment.

#### B. FTA Response

FTA notes that several commenters recommended that aluminum composite conducting rail, otherwise known as Bimetallic Power Transmission (BPTS) Equipment, which is a combination of an aluminum conductor and a stainless steel abrasion-resistant cap, be added to the list of traction power equipment in 49 CFR 661.11(v). However, FTA’s current regulation at 49 CFR 661.11(w)

states that “[t]he power or third rail is not considered traction power equipment and is thus subject to the requirements of 49 U.S.C. 5323(j) and the requirements of 49 CFR 661.5.”

FTA believes that these recommendations go beyond the scope of the present rulemaking. Currently, all power or third rails, regardless of whether made primarily from aluminum, steel, or some other material, is excluded from the definition of “traction power equipment” and instead is subject to 49 CFR 661.5. If the rail is made of steel or iron, the product must comply with 49 CFR 661.5(c). If BPTS third rail is not made primarily of steel, it would be treated as a manufactured product under 49 CFR 661.5(d). In order to provide a competitive and level playing field, FTA is interpreting the commenters’ recommendations as a request to classify power or third rails as traction power equipment, whether made of steel, aluminum, or some other material. This would require a Congressional action to exclude steel and iron contact rail from the domestic manufacturing requirements of 661.5(c), which is beyond FTA’s authority in this rulemaking.

#### 7. Statutory Update

The SNPRM proposed to amend the debarment and suspension provisions in 49 CFR 661.18 to incorporate a reference to SAFETEA-LU, replacing the existing reference to the Intermodal Surface Transportation Efficient Act of 1991 (ISTEA).

#### A. Comments Received

Commenters were unanimous in their support of the amendment.

#### B. FTA Response

FTA is adopting the amendment without change. FTA is also amending the statutory references to section 165 of the Surface Transportation Assistance Act of 1982 in 49 CFR 661.6 and 661.12 and replacing them with references to the current Buy America requirements at 49 U.S.C. 5323(j). In addition, FTA is amending the title of 49 Part 661 to remove the reference to the Surface Transportation Assistance Act of 1982 so that the title will simply read, “Buy America Requirements.”

## II. Regulatory Analyses and Notices

### A. Statutory/Legal Authority for This Rulemaking

This final rule is authorized under SAFETEA-LU (Pub. L. 109–59), which amended Section 5323(j) and (m) of Title 49, United States Code and required FTA to revise its regulations

with respect to Buy America requirements.

### B. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is a nonsignificant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget. This final rule is also nonsignificant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034, Feb. 26, 1979). This final rule imposes no new compliance costs on the regulated industry; it merely clarifies terms existing in the Buy America regulations and adds terms consistent with SAFETEA-LU.

### C. Executive Order 13132

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (“Federalism”). This final rule does not include any regulation that has substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

### D. Executive Order 13175

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 (“Consultation and Coordination with Indian Tribal Governments”). Because this final rule does not have tribal implications and does not impose direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

### E. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act (5 U.S.C. 601–611) requires each agency to analyze regulations and proposals to assess their impact on small businesses and other small entities to determine whether the rule or proposal will have a significant economic impact on a substantial number of small entities. This final rule imposes no significant new costs on small entities, and in fact, is expected to reduce costs by eliminating specific recordkeeping burdens. Therefore, FTA certifies that this proposal does not require further analysis under the Regulatory Flexibility Act.



#### F. Unfunded Mandates Reform Act of 1995

This final rule does not propose unfunded mandates under the Unfunded Mandates Reform Act of 1995. If the proposals are adopted into a final rule, it will not result in costs of \$100 million or more (adjusted annually for inflation), in the aggregate, to any of the following: State, local, or Native American tribal governments, or the private sector.

#### G. Paperwork Reduction Act

This final rule proposes no new information collection requirements.

#### H. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document may be used to cross-reference this action with the Unified Agenda.

#### I. Environmental Assessment

The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321–4347), requires Federal agencies to consider the consequences of major Federal actions and prepare a detailed statement on actions significantly affecting the quality of the human environment. There are no significant environmental impacts associated with this final rule.

#### J. Privacy Act

Anyone is able to search the electronic form for all comments received into any of our dockets by the name of the individual submitting the comments (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit <http://dms.dot.gov>.

#### List of Subjects in 49 CFR Part 661

Grant programs—transportation, Public transportation, Reporting and recordkeeping requirements.

■ Accordingly, for the reasons described in the preamble, part 661 of the Code of Federal Regulations is amended as follows:

#### PART 661—BUY AMERICA REQUIREMENTS

■ 1. The authority citation for part 661 is amended to read as follows:

**Authority:** 49 U.S.C. 5323(j) (formerly sec. 165 of the Surface Transportation Assistance Act of 1982 (Pub. L. 97–424); as amended by sec. 337, Pub. L. 100–17; sec. 1048, Pub. L. 102–240; sec. 3020(b), Pub. L. 105–178; and sec. 3023(i) and (k), Pub. L. 109–59); 49 CFR 1.51.

■ 2. The heading for part 661 is revised to read as set forth above.

#### § 661.1 [Amended].

■ 3. Amend § 661.1 by removing “Federal Mass Transit Act of 1964, as amended” and adding in its place “49 U.S.C. 5323(j)”.

■ 4. Revise § 661.3 to read as follows:

#### § 661.3 Definitions.

As used in this part:

*Act* means the Federal Public Transportation Law (49 U.S.C. Chapter 53).

*Administrator* means the Administrator of FTA, or designee.

*Component* means any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into the end product at the final assembly location.

*Contractor* means a party to a third party contract other than the grantee.

*End product* means any vehicle, structure, product, article, material, supply, or system, which directly incorporates constituent components at the final assembly location, that is acquired for public use under a federally-funded third-party contract, and which is ready to provide its intended end function or use without any further manufacturing or assembly change(s). A list of representative end products is included at Appendix A to this section.

*FTA* means the Federal Transit Administration.

*Grantee* means any entity that is a recipient of FTA funds.

*Manufactured product* means an item produced as a result of the manufacturing process.

*Manufacturing process* means the application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from that which would result from mere assembly of the elements or materials.

*Negotiated procurement* means a contract awarded using other than sealed bidding procedures.

*Rolling stock* means transit vehicles such as buses, vans, cars, railcars, locomotives, trolley cars and buses, and ferry boats, as well as vehicles used for support services.

*System* means a machine, product, or device, or a combination of such equipment, consisting of individual components, whether separate or interconnected by piping, transmission devices, electrical cables or circuitry, or by other devices, which are intended to contribute together to a clearly defined function. Factors to consider in determining whether a system constitutes an end product include: Whether performance warranties apply to an integrated system (regardless of whether components are separately warranted); whether products perform on an integrated basis with other products in a system, or are operated independently of associated products in the system; or whether transit agencies routinely procure a product separately (other than as replacement or spare parts).

*United States* means the several States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

#### Appendix A to § 661.3—End Products

The following is a list of representative end products that are subject to the requirements of Buy America. This list is representative, not exhaustive.

(1) *Rolling stock end products:* All individual items identified as rolling stock in § 661.3 (e.g., buses, vans, cars, railcars, locomotives, trolley cars and buses, ferry boats, as well as vehicles used for support services); train control, communication, and traction power equipment that meets the definition of end product at § 661.3 (e.g., a communication or traction power system).

(2) *Steel and iron end products:* Items made primarily of steel or iron such as structures, bridges, and track work, including running rail, contact rail, and turnouts.

(3) *Manufactured end products:* Infrastructure projects not made primarily of steel or iron, including structures (terminals, depots, garages, and bus shelters), ties and ballast; contact rail not made primarily of steel or iron; fare collection systems; computers; information systems; security systems; data processing systems; and mobile lifts, hoists, and elevators.

#### § 661.6 [Amended]

■ 5. Amend § 661.6 as follows:

■ a. Remove “Certificate of Compliance With Section 165(a)” and add in its place “Certificate of Compliance with Buy America Requirements” and remove “section 165(a) of the Surface Transportation Assistance Act of 1982, as amended” and add in its place “49 U.S.C. 5323(j)(1)”.

■ b. Remove “Certificate for Non-Compliance with Section 165(a)” and add in its place “Certificate of Non-Compliance with Buy America

Requirements”, remove “section 165(a) of the Surface Transportation Assistance Act of 1982, as amended” and add in its place “49 U.S.C. 5323(j)”, and remove “section 165(b)(2) or (b)(4) of the Surface Transportation Assistance Act of 1982” and add in its place “49 U.S.C. 5323(j)(2)”.

■ 6. Amend § 661.7 as follows:

■ a. In paragraph (a), remove “Section 165(b) of the Act” and add in its place “Section 5323(j)(2) of Title 49 United States Code” and remove “section 165(a)” and add in its place “49 U.S.C. 5323(j)(1)”.

■ b. Revise paragraph (b);

■ c. Amend paragraph (c) by removing “section 165(b)(2) of the Act” and adding in its place “49 U.S.C. 5323(j)(2)” and removing “section 165(a)” and adding in its place “49 U.S.C. 5323(j)”;

■ d. Add a new paragraph (c)(3);

■ e. Amend paragraph (e) by removing “section 165(b) of the Act” and adding in its place “49 U.S.C. 5323(j)(2)”;

■ f. Amend paragraph (f) by removing “section 165(b)(3) of the Act” and adding in its place “49 U.S.C. 5323(j)(2)(C)”;

■ g. Amend Appendix A to § 661.7 by removing paragraphs (b) and (c) and adding new paragraph (b).

The revisions and addition read as follows:

**§ 661.7 Waivers.**

\* \* \* \* \*

(b) Under the provision of 49 U.S.C. 5323(j)(2)(A), the Administrator may waive the general requirements of 49 U.S.C. 5323(j)(1) if the Administrator finds that their application would be inconsistent with the public interest. In determining whether the conditions exist to grant this public interest waiver, the Administrator will consider all appropriate factors on a case-by-case basis, unless a general exception is specifically set out in this part. When granting a public interest waiver, the Administrator shall issue a detailed written statement justifying why the waiver is in the public interest. The Administrator shall publish this justification in the **Federal Register**, providing the public with a reasonable time for notice and comment of not more than seven calendar days.

(c) \* \* \*

(3) After contract award, the Administrator may grant a non-availability waiver under this paragraph, in any case in which a bidder or offeror originally certified compliance with the Buy America requirements in good faith, but can no longer comply with its certification. The Administrator will grant a non-

availability waiver only if the grantee provides sufficient evidence that the original certification was made in good faith and that the item to be procured cannot now be obtained domestically due to commercial impossibility or impracticability. In determining whether the conditions exist to grant a post-award non-availability waiver, the Administrator will consider all appropriate factors on a case-by-case basis.

\* \* \* \* \*

**Appendix A to § 661.7—General Waivers**

\* \* \* \* \*

(b) Under the provisions of § 661.7 (b) and (c) of this part, a general public interest waiver from the Buy America requirements applies to microprocessors, computers, microcomputers, or software, or other such devices, which are used solely for the purpose of processing or storing data. This general waiver does not extend to a product or device which merely contains a microprocessor or microcomputer and is not used solely for the purpose of processing or storing data.

\* \* \* \* \*

■ 7. Amend § 661.9(a) by removing “section 165(b)(3) of the Act” and “section 165(b)(3)” and adding in their place “49 U.S.C. 5323(j)(2)(C)”.

■ 8. Amend § 661.11 as follows:

■ a. Remove and reserve paragraph (s).

■ b. Add paragraphs (t)(14) through (t)(22), (u)(18) through (u)(30), and (v)(28) through (30);

■ c. Amend Appendix B by adding “Car body shells” before “Engines”;

■ d. Amend Appendix C by adding “engines” after “Car shells” and remove “doors, door actuators, and controls,” and add in its place “doors, door actuators and controls, wheelchair lifts and ramps to make the vehicle accessible to persons with disabilities.”; and

■ e. Add a new Appendix D.

The additions read as follows:

**§ 661.11 Rolling stock procurements.**

\* \* \* \* \*

(t) \* \* \*

- (14) Cab Signaling;
- (15) ATO Equipment;
- (16) ATP Equipment;
- (17) Wayside Transponders;
- (18) Trip Stop Equipment;
- (19) Wayside Magnets;
- (20) Speed Measuring Devices;
- (21) Car Axle Counters;
- (22) Communication Based Train Control (CBTC).

(u) \* \* \*

- (18) Antennas;
- (19) Wireless Telemetry Equipment;
- (20) Passenger Information Displays;

- (21) Communications Control Units;
- (22) Communication Control Heads;
- (23) Wireless Intercar Transceivers;
- (24) Multiplexers;
- (25) SCADA Systems;
- (26) LED Arrays;
- (27) Screen Displays such as LEDs and LCDs for communication systems;
- (28) Fiber-optic transmission equipment;
- (29) Fiber-optic transmission equipment;
- (30) Frame or cell based multiplexing equipment; 13) Communication system network elements.

(v) \* \* \*

- (28) Propulsion Control Systems;
- (29) Surge Arrestors;
- (30) Protective Relaying.

\* \* \* \* \*

**Appendix D to § 661.11—Minimum Requirements for Final Assembly**

(a) *Rail Cars*: In the case of the manufacture of a new, remanufactured, or overhauled rail car, final assembly would typically include, as a minimum, installation and interconnection of the typical Rail Car Components listed in § 661.11, Appendix C, including but not limited to the following items: car bodies or shells, chassis, carbody wiring, car-borne power plants or power pick-up equipment, energy management and storage devices, articulation equipment, propulsion control equipment, propulsion cooling equipment, friction brake equipment, energy sources for auxiliary equipment and controls, heating and air conditioning equipment, interior and exterior lighting equipment, coupler equipment and coupler control system, communications equipment, pneumatic systems, electrical systems, door and door control systems, passenger seats, passenger interiors, cab interiors, destination signs, wheelchair lifts (or other equipment required to make the vehicle accessible to persons with disabilities), motors, wheels, axles, gear boxes or integrated motor/gear units, suspensions, and truck frames. Final Assembly activities shall also include the inspection and verification of all installation and interconnection work; and the in-plant testing of the rail car to verify all functions. In the case of articulated vehicles, the interconnection of the car bodies or shells shall be included as work to be performed by the manufacturer as part of vehicle delivery.

(b) *Buses*: In the case of a new, remanufactured, or overhauled bus, final assembly would typically include, at a minimum, the installation and interconnection of the typical Bus Components listed in § 661.11, Appendix B, including but not limited to the following items: car bodies or shells, the engine and transmission (drive train), axles, energy management and storage devices, articulation equipment, propulsion control system, chassis, and wheels, cooling system, and braking systems; the installation and interconnection of the heating and air conditioning equipment; the installation of pneumatic system and the electrical system,

door systems, passenger seats, passenger grab rails, destination signs, wheelchair lifts or ramps and other equipment required to make the vehicle accessible to persons with disabilities, and road testing. Final Assembly activities shall also include final inspection, repairs and preparation of the vehicles for delivery. In the case of articulated vehicles, the interconnection of the car bodies or shells shall be included as work to be performed by the manufacturer as part of vehicle delivery.

(c) If a manufacturer's final assembly processes do not include all the activities that are typically considered the minimum requirements, it can request a Federal Transit Administration (FTA) determination of compliance. FTA will review these requests on a case-by-case basis to determine compliance with Buy America.

**§ 661.12 [Amended]**

■ 9. Amend § 661.12 as follows:

■ a. Remove "Certificate of Compliance With Section 165(b)(3)" and add in its place "Certificate of Compliance with Buy America Rolling Stock Requirements" and remove "section 165(b)(3) of the Surface Transportation Assistance Act of 1982, as amended" and add in its place "49 U.S.C. 5323(j)" and

■ b. Remove "Certificate for Non-Compliance with Section 165(b)(3)" and add in its place "Certificate of Non-Compliance with Buy America Rolling Stock Requirements"; remove "section 165(b)(3) of the Surface Transportation

Assistance Act of 1982, as amended" and add in its place "49 U.S.C. 5323(j)"; and remove "section 165(b)(2) or (b)(4) of the Surface Transportation Assistance Act of 1982" and add in its place "49 U.S.C. 5323(j)(2)(C)".

**§ 661.18 [Amended]**

■ 10. Amend the introductory text by removing "the Intermodal Surface Transportation Efficiency Act of 1991" and adding in its place "the Federal Public Transportation Act of 2005".

**James S. Simpson,**

*Administrator.*

[FR Doc. E7-18355 Filed 9-19-07; 8:45 am]

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